

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KEVIN J. LISLE,

Plaintiff,

vs.

RENE BAKER, *et al.*,

Defendants.

3: 09-cv-00479-RCJ-VPC

ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections, has submitted an amended civil rights complaint pursuant to 42 U.S.C. § 1983 (Docket #8.). Plaintiff has also filed numerous motions with the court. The court has screened Plaintiff's civil rights complaint pursuant to 28 U.S.C. § 1915A and finds that it must be dismissed.

I. Screening Pursuant to 28 U.S.C. § 1915A

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by

1 the Constitution or laws of the United States was violated, and (2) that the alleged violation was
2 committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

3 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation
4 Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of poverty
5 is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief may be granted,
6 or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2).
7 Dismissal of a complaint for failure to state a claim upon which relief can be granted is provided for in
8 Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under § 1915 when
9 reviewing the adequacy of a complaint or an amended complaint. When a court dismisses a complaint
10 under § 1915(e), the plaintiff should be given leave to amend the complaint with directions as to curing
11 its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured
12 by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

13 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*
14 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim
15 is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that
16 would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making
17 this determination, the Court takes as true all allegations of material fact stated in the complaint, and the
18 Court construes them in the light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d
19 955, 957 (9th Cir. 1996). Allegations of a pro se complainant are held to less stringent standards than
20 formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404
21 U.S. 519, 520 (1972) (per curiam). While the standard under Rule 12(b)(6) does not require detailed
22 factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp.*
23 *v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). A formulaic recitation of the elements of a cause of action
24 is insufficient. *Id.*, see *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

25 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the
26 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal

1 conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims of
 2 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual
 3 allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28
 4 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

5 **II. Screening of the Complaint**

6 Plaintiff sues defendants Rene Baker, Robert Bannister, Joe Brackbill, Debra Brooks, Max Carter,
 7 John E. Jensen, D. Jones, Catherine C. Masto, D. Mellon, G. Murphy, E. K. McDaniel, Howard Skolnic,
 8 and C. Willis. Plaintiff seeks monetary damages as well as injunctive and declaratory relief.

9 **A. Defendants**

10 The Civil Rights Act under which this action was filed provides:

11 Every person who, under color of [state law] . . . subjects, or causes to
 12 be subjected, any citizen of the United States. . . to the deprivation of any
 13 rights, privileges, or immunities secured by the Constitution. . . shall be
 liable to the party injured in an action at law, suit in equity, or other
 proper proceeding for redress. 42 U.S.C. § 1983.

14 The statute plainly requires that there be an actual connection or link between the actions of the
 15 defendants and the deprivation alleged to have been suffered by plaintiff. *See Monell v. Department of*
 16 *Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). The Ninth Circuit has held
 17 that “[a] person ‘subjects’ another to the deprivation of a constitutional right, within the meaning of
 18 section 1983, if he does an affirmative act, participates in another’s affirmative acts or omits to perform
 19 an act which he is legally required to do that causes the deprivation of which complaint is made.”
 20 *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)

21 **B. Count I**

22 Plaintiff alleges that a variety of events related to health care occurred between May 6, 1996, and
 23 May 10, 2007. Congress has provided no specific statute of limitations for section 1983 actions. Instead,
 24 state statutes of limitations apply in section 1983 cases unless the state laws are inconsistent with federal
 25 law. 42 U.S.C. § 1988. The Supreme Court has held that for purposes of selecting a statute of
 26 limitations, section 1983 actions are best characterized as personal injury actions. *Wilson v. Garcia*, 471

1 U.S. 261 (1985). The applicable statute of limitations for 1983 actions brought in Nevada is two years.
2 NRS 11.190(4)(e); *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989), *cert. denied*, 493 U.S. 860
3 (1989). Federal law determines when a cause of action accrues; a federal claim accrues when the
4 plaintiff knows or has reason to know of the injury which is the basis of the action. *Bagley v. CMC Real*
5 *Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991).

6 The court finds that plaintiff knew of the injuries alleged in this action at the time that they
7 occurred. The court received plaintiff's complaint in this action on August 21, 2009. Accordingly, the
8 court finds that all of plaintiff's claims based on events occurring between May 6, 1996, and May 10,
9 2007, are barred as untimely under the statute of limitations.

10 Plaintiff alleges that he filed a grievance in September of 2007 related to medical care and prison
11 officials refused to release ultrasound/catscan film to him as required by prison policy O.P. 603.
12 Prisoners have no constitutional right to an inmate grievance system. *Olim v. Wakinekona*, 461 U.S. 238,
13 249 (1983). "[A prison] grievance procedure is a procedural right only, it does not confer any
14 substantive right upon the inmates." *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993), (citing *Azeez*
15 *v. DeRobertis*, 568 F. Supp. 8, 10 (N.D. Ill. 1982); *see also Mann v. Adams*, 855 F.2d 639, 640 (9th Cir.
16 1988). "Hence, it does not give rise to a protected liberty interest requiring the procedural protections
17 envisioned by the Fourteenth Amendment." *Azeez v. DeRobertis*, 568 F. Supp. at 10; *Spencer v. Moore*,
18 638 F. Supp. 315, 316 (E.D. Mo. 1986). Specifically, failure to process a grievance does not state a
19 constitutional violation. *Buckley*, 997 F.2d at 495. Accordingly, the court finds that plaintiff's claim
20 regarding receiving copies of ultrasound or catscan film does not state a due process claim under the
21 Fourteenth Amendment.

22 Plaintiff claims that in 2008 he discovered that medical staff had conspired to fraudulently
23 document false progress notes and physician orders in his medical records from the period of May 4,
24 2007, to May 7, 2007, so as to minimize the seriousness of his medical condition. The court finds that
25 this allegation does not state a claim for violation of any constitutional right.

26 ///

1 Plaintiff alleges that he reported lower back pain to prison authorities in August and September
2 of 2007. Plaintiff claims that on September 24, 2007, prison medical staff gave him an injection of
3 methylprednisolone, which had no affect on the pain. He further alleges that he had other
4 communications with medical staff regarding his back in December 2007, and that medical staff provided
5 false or evasive information. Plaintiff alleges that he continued to suffer excruciating back pain, in part
6 because of being over-medicated on coumadin, a blood thinner. Plaintiff claims that Dr. Mar provided
7 a false diagnosis that plaintiff's back pain stemmed from muscle tightness. Finally, plaintiff alleges that
8 on April 22, 2009, he requested that a new pair of shower shoes be sent in at his expense, based on the
9 same medical needs found to exist in July 2002. He claims that Joe Brackbill deliberately and maliciously
10 denied the request. Plaintiff alleges that these various claims demonstrate deliberate indifference to
11 serious medical needs in violation of his rights under the Eighth and Fourteenth Amendment.

12 A prisoner's claim of inadequate medical care does not constitute cruel and unusual punishment
13 unless the mistreatment rises to the level of "deliberate indifference to serious medical needs." *Estelle*
14 *v. Gamble*, 429 U.S. 97, 106 (1976). The "deliberate indifference" standard involves an objective and
15 a subjective prong. First, the alleged deprivation must be, in objective terms, "sufficiently serious."
16 *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).
17 Second, the prison official must act with a "sufficiently culpable state of mind," which entails more than
18 mere negligence, but less than conduct undertaken for the very purpose of causing harm. *Farmer v.*
19 *Brennan*, 511 U.S. at 837. A prison official does not act in a deliberately indifferent manner unless the
20 official "knows of and disregards an excessive risk to inmate health or safety." *Id.*

21 In applying this standard, the Ninth Circuit has held that before it can be said that a prisoner's civil
22 rights have been abridged, "the indifference to his medical needs must be substantial. Mere 'indifference,'
23 'negligence,' or 'medical malpractice' will not support this cause of action." *Broughton v. Cutter*
24 *Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980), citing *Estelle*, 429 U.S. at 105-06. "[A] complaint that
25 a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim
26 of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a

1 constitutional violation merely because the victim is a prisoner.” *Estelle v. Gamble*, 429 U.S. at 106; *see*
 2 *also Anderson v. County of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995); *McGuckin v. Smith*, 974 F.2d
 3 1050, 1050 (9th Cir. 1992), *overruled on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133,
 4 1136 (9th Cir. 1997)(en banc). Even gross negligence is insufficient to establish deliberate indifference
 5 to serious medical needs. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990).

6 The court finds that the facts alleged by plaintiff do not demonstrate deliberate indifference but
 7 rather simply show that plaintiff disagreed with the diagnosis or treatment he was given at Ely State
 8 Prison. A prisoner’s mere disagreement with diagnosis or treatment does not support a claim of
 9 deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). Accordingly, the court finds
 10 that count one does not state a claim for relief upon which relief may be granted.

11 C. Count 2

12 In count 2, plaintiff incorporates the facts alleged in count 1 and claims the existence of a
 13 conspiracy, in violation of the First, Eighth and Fourteenth Amendments.

14 The Ninth Circuit imposes a heightened pleading standard in cases in which subjective intent is
 15 an element of a constitutional tort action. *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991)
 16 (*Branch I*), *cert. denied*, 114 U.S. 2704 (1994), *reaffirmed*, 14 F.3d 449 (9th Cir. 1994) (*Branch II*). A
 17 claim of conspiracy involves a determination of defendants’ subjective intent, thus, the heightened
 18 pleading standard applies in this case. In order to survive a motion to dismiss, “plaintiffs must state in
 19 their complaint nonconclusory allegations setting forth evidence of unlawful intent.” *Id.* These
 20 allegations “must be specific and concrete enough to enable the defendants to prepare a response, and
 21 where appropriate, a motion for summary judgment based on qualified immunity.” *Id.*, quoting *Whitacre*
 22 *v. Davey*, 890 F.2d 1168, 1171 (D.C. Cir. 1989). The nonconclusory allegations of subjective motivation
 23 may be supported by either direct or circumstantial evidence. *Branch v. Tunnell*, 937 F.2d at 1387.

24 In the context of conspiracy claims brought pursuant to section 1983, such a complaint must
 25 “allege specific facts to support the existence of a conspiracy among the defendants.” *Buckey v. County*
 26 *of Los Angeles*, 968 791, 794 (9th Cir. 1992); *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d

1 621, 626 (9th Cir. 1988). Plaintiff must allege that defendants conspired or acted jointly in concert and
2 that some overt act was done in furtherance of the conspiracy. *Sykes v. State of California*, 497 F.2d 197,
3 200 (9th Cir. 1974). In this case, plaintiff has failed to allege specific facts to support the existence of
4 a conspiracy between defendants. Accordingly, the court finds that plaintiff fails to state a claim for
5 conspiracy upon which relief can be granted.

6 **D. Count 3**

7 In count 3, plaintiff incorporates the facts alleged in count 1 and then claims a violation of his
8 rights under the First, Eighth and Fourteenth Amendments based on a failure to train, supervise or
9 discipline, a failure to act to remedy a wrong, and creating or allowing an unconstitutional policy or
10 custom. The court finds that essentially, plaintiff is alleging constitutional violations based on
11 supervisory liability.

12 Supervisory personnel are generally not liable under section 1983 for the actions of their
13 employees under a theory of *respondeat superior* and, therefore, when a named defendant holds a
14 supervisory position, the causal link between him and the claimed constitutional violation must be
15 specifically alleged. *See Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589
16 F.2d 438, 441 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979). To show a *prima facie* case of
17 supervisory liability, plaintiff must allege facts indicating that supervisory defendants either: personally
18 participated in the alleged deprivation of constitutional rights; knew of the violations and failed to act to
19 prevent them; or promulgated or implemented “a policy so deficient that the policy ‘itself is a repudiation
20 of constitutional rights’ and is ‘the moving force of the constitutional violation.’” *Hansen v. Black*, 885
21 F.2d 642, 646 (9th Cir. 1989) (quoting *Thompkins v. Belt*, 828 F.2d 298, 303-04 (5th Cir. 1987); *Taylor*
22 *v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Although federal pleading standards are broad, some facts
23 must be alleged to support claims under Section 1983. *See Leatherman v. Tarrant County Narcotics*
24 *Unit*, 113 S.Ct. 1160, 1163 (1993). In this case, the court finds that plaintiff has alleged no facts which
25 support a civil rights claim based on supervisory liability. Count 3 therefore fails to state a claim upon
26 which relief can be granted.

1 **E. Motion for Preliminary Injunction**

2 On February 19, 2010, plaintiff filed a motion for a preliminary injunction. (Docket #6.)

3 Injunctive relief, whether temporary or permanent, is an “extraordinary remedy, never awarded as of

4 right.” *Winter v. Natural Res. Defense Council*, 129 S. Ct. 365, 376 (2008). “A plaintiff seeking a

5 preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer

6 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that

7 an injunction is in the public interest.” *Am. Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046,

8 1052 (9th Cir. 2009) (quoting *Winter*, 129 S. Ct. at 374). The standard for a permanent injunction is

9 essentially the same as for a preliminary injunction, with the exception that the plaintiff must show actual

10 success, rather than a likelihood of success. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531,

11 546 n.12 (1987).

12 As set forth above, plaintiff has no likelihood of success in this action. The court further finds

13 that he has shown no likelihood of irreparable injury. To the extent that plaintiff alleges additional facts

14 beyond those he alleges in his complaint, the court declines to address them. Accordingly, plaintiff’s

15 request for injunctive relief will be denied.

16

17 **IT IS THEREFORE ORDERED** that the clerk shall **FILE** the amended complaint. (Docket

18 #8-1.)

19 **IT IS FURTHER ORDERED** that plaintiff’s motion to get proper procedure is **DENIED as**

20 **moot.** (Docket #10.)

21 **IT IS FURTHER ORDERED** that plaintiff’s motion for service is **DENIED as moot.** (Docket

22 #12.)


23 **IT IS FURTHER ORDERED** that plaintiff’s motion for reconsideration of the order denying

24 appointment of counsel is **DENIED** as without legal merit. (Docket #13.)

25 **IT IS FURTHER ORDERED** that plaintiff’s motion for preliminary or permanent injunction

26 is **DENIED.** (Docket #6.)

DATED: This 16th day of August, 2010.


UNITED STATES DISTRICT JUDGE